

DAWN ANGELA NORRIS,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

JURISDICTION

¹While Plaintiff's counsel indicated Plaintiff filed an application under Title XVI, no application was found and, thus, the claim was adjudicated solely under Title II. (Tr. 12; 131.) In Plaintiff's application for disability benefits she declared, "[t]he

1 application for a period of disability and disability insurance
2 benefits, alleging disability beginning July 30, 2000. (Tr. 12;
3 71.) She alleged disability due to left shoulder/neck problems,
4 PTSD, severe depression, COPD, and respiratory deficiency. (Tr.
5 71.) Plaintiff's claim was denied initially and on reconsideration,
6 and she requested a hearing before an administrative law judge
7 (ALJ). (Tr. 39-59; 132-33.) A hearing was held on May 7, 2009, at
8 which Paul Morrison, Vocational Expert, and Plaintiff, who was
9 represented by counsel, testified. (Tr. 19-36.) ALJ Donna Montano
10 presided. (Tr. 19.) The ALJ denied benefits on September 9, 2009,
11 and the Appeals council declined review. (Tr. 12-18; 1-3.) The
12 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

13 STATEMENT OF THE CASE

14 The facts of the case are set forth in detail in the transcript
15 of proceedings and are briefly summarized here. At the time of the
16 hearing, Plaintiff was 54 years old, separated from her spouse and
17 living with a boyfriend. (Tr. 29.) Plaintiff completed high
18 school.² (Tr. 169.) Plaintiff has worked as a sewing machine
19 operator, meat wrapper and warehouse worker. (Tr. 33; 99.) In
20 2001, Plaintiff worked in Mississippi, as a seamstress in a mattress

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22 SSI program has been explained to me. I understand that I do not
23 qualify. I am not applying at this time and I do not require a
24 formal denial." (Tr. 57.)

25 ²A single reference in the record indicates Plaintiff attended
26 college for three years to work as a dental technician. (Tr. 169.)
27 All other references indicate Plaintiff simply graduated from high
28 school. (Tr. 203; 321.)

1 factory and stopped working when she was laid off. (Tr. 27; 100.)
2 Plaintiff testified that when she tried to return to work, the
3 restrictions on her left shoulder prevented her from performing the
4 sewing work. (Tr. 27.) Plaintiff is left-handed. (Tr. 28.) She
5 testified that she cannot lift more than one pound, and she cannot
6 do repetitive motions or her shoulder will freeze. (Tr. 28.)
7 Plaintiff also testified that she cannot be around other people or
8 she suffers anxiety attacks, and she was hospitalized in Indiana a
9 number of times for psychiatric reasons, including aggression and
10 suicide ideation. (Tr. 28-29; 31.) Plaintiff reported she was a
11 heavy drug user of heroin, methamphetamine and cocaine. (Tr. 169.)
12 She asserted that she has been clean since 1981, but in August 2006,
13 she reported she smoked marijuana "on rare occasions and this has
14 been a long standing pattern," and in October 2006, Plaintiff
15 reported she was smoking marijuana on a daily basis. (Tr. 93; 149;
16 169; 202; 256.)

17 ADMINISTRATIVE DECISION

18 ALJ Montano found Plaintiff's date of last insured was December
19 31, 2005. (Tr. 14.) At step one, he found Plaintiff had not engaged
20 in substantial gainful activity since July 30, 2006. (Tr. 14.) At
21 step two, the ALJ found Plaintiff had medically determinable
22 impairments of "chronic obstructive pulmonary disease (COPD) and
23 depression." (Tr. 14.) The ALJ found that through the date of last
24 insured, Plaintiff did not have an impairment or combination of
25 impairments that significantly limited her ability to perform basic
26 work-related activities for 12 consecutive months and, therefore,
27 Plaintiff did not have a severe impairment or combination of
28 impairments. (Tr. 15.) The ALJ concluded that Plaintiff was not

1 under a disability from the alleged onset date of July 30, 2000,
2 through the date of last insured, December 31, 2005. (Tr. 18.)

3 **STANDARD OF REVIEW**

4 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
5 court set out the standard of review:

6 A district court's order upholding the Commissioner's
7 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
8 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
9 Commissioner may be reversed only if it is not supported
10 by substantial evidence or if it is based on legal error.
11 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
12 Substantial evidence is defined as being more than a mere
13 scintilla, but less than a preponderance. *Id.* at 1098.
14 Put another way, substantial evidence is such relevant
15 evidence as a reasonable mind might accept as adequate to
16 support a conclusion. *Richardson v. Perales*, 402 U.S.
17 389, 401 (1971). If the evidence is susceptible to more
18 than one rational interpretation, the court may not
19 substitute its judgment for that of the Commissioner.
20 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
21 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,
23 resolving conflicts in medical testimony, and resolving
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
25 Cir. 1995). The ALJ's determinations of law are reviewed
26 *de novo*, although deference is owed to a reasonable
27 construction of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
34 Nevertheless, a decision supported by substantial evidence will
35 still be set aside if the proper legal standards were not applied in
36 weighing the evidence and making the decision. *Browner v. Secretary*
37 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
38 substantial evidence exists to support the administrative findings,

1 or if conflicting evidence exists that will support a finding of
2 either disability or non-disability, the Commissioner's
3 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
4 1230 (9th Cir. 1987).

5 SEQUENTIAL PROCESS

6 The Commissioner has established a five-step sequential
7 evaluation process for determining whether a person is disabled. 20
8 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
9 137, 140-42 (1987). In steps one through four, the burden of proof
10 rests upon the claimant to establish a prima facie case of
11 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
12 This burden is met once a claimant establishes that a physical or
13 mental impairment prevents him from engaging in his previous
14 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
15 claimant cannot do his past relevant work, the ALJ proceeds to step
16 five, and the burden shifts to the Commissioner to show that (1) the
17 claimant can make an adjustment to other work; and (2) specific jobs
18 exist in the national economy which claimant can perform. *Batson v.*
19 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
20 If a claimant cannot make an adjustment to other work in the
21 national economy, a finding of "disabled" is made. 20 C.F.R. §§
22 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

23 ISSUES

24 Plaintiff contends that the ALJ erred by dismissing her mental
25 impairment as groundless at step two. (ECF No. 14 at 5.) She also
26 contends that the ALJ erred in assessing Plaintiff's credibility.
27 (ECF No. 14 at 19.) Defendant contends the ALJ's decision is
28 supported by substantial evidence and free of legal error. (ECF No.

1 18.)

2 **DISCUSSION**

3 Plaintiff contends that the ALJ erred by rejecting her mental
4 impairment at step two. (ECF No. 14 at 5.) At step two of the
5 sequential evaluation, the ALJ determines whether a claimant suffers
6 from a "severe" impairment, *i.e.*, one that significantly limits his
7 physical or mental ability to do basic work activities. 20 C.F.R.
8 §§ 404.1520, 416.920(c). To satisfy step two's requirement of a
9 severe impairment, the claimant must prove the existence of a
10 physical or mental impairment by providing medical evidence
11 consisting of signs, symptoms, and laboratory findings; the
12 claimant's own statement of symptoms alone will not suffice. 20
13 C.F.R. §§ 404.1508, 416.908. In addition, the impairment must last,
14 or be expected to last, for a continuous period of at least 12
15 months. 20 C.F.R. §§ 404.1509, 416.909 (durational requirement).
16 The fact that a medically determinable condition exists does not
17 automatically mean the symptoms are "severe," or "disabling" as
18 defined by the Social Security regulations. See, e.g., *Edlund*, 253
19 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 602-03 (9th Cir.
20 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

21 At step two, a claimant must make a threshold showing that her
22 medically determinable impairments significantly limit her ability
23 to perform basic work activities. See *Bowen*, 482 U.S. at 145; 20
24 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers
25 to "the abilities and aptitudes necessary to do most jobs." 20
26 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of
27 impairments can be found 'not severe' only if the evidence
28 establishes a slight abnormality that has 'no more than a minimal

1 effect on an individual's ability to work.'" *Smolen v. Chater*, 80
2 F.3d 1273, 1290 (9th Cir. 1996)(quoting SSR 85-28). "[T]he step two
3 inquiry is a de minimis screening device to dispose of groundless
4 claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54).

5 In determining whether a claimant's impairments are severe at
6 step two, the ALJ evaluates medical evidence submitted and explains
7 the weight given to the opinions of acceptable medical sources in
8 the record. SSR 85-28. If the medical source is an examining or
9 treating physician, the Commissioner must provide "clear and
10 convincing" reasons for rejecting an uncontradicted opinion.
11 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v.*
12 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the opinion is
13 contradicted, it can only be rejected for "specific" and
14 "legitimate" reasons that are supported by substantial evidence in
15 the record. *Andrews*, 53 F.3d at 1043. Where a medical source
16 opinion is based primarily on a claimant's self-reported symptoms,
17 credibility is an appropriate factor to consider in the evaluation
18 of medical evidence at step two. *Webb v. Barnhart*, 433 F.3d 683,
19 687 (9th Cir. 2005).

20 **A. Step Two Medical Evidence of Mental Impairment.**

21 The ALJ found that no medical evidence indicated Plaintiff was
22 disabled, "[a]s for the opinion evidence, the records covering the
23 relevant period do not contain any opinions from any treating or
24 examining physicians indicating that the claimant was disabled or
25 even had impairments that might cause significant limitation in her
26 ability to perform basic work activities." (Tr. 17-18.)
27 Additionally, the ALJ found that Dr. Salazar's late December, 2005,
28 GAF estimate of 60 indicated that Plaintiff had only moderate

1 impairment in social and occupational functioning. (Tr. 18.)
2 Finally, the ALJ applied the "special technique" required for
3 analyzing mental impairments and found Plaintiff had mild
4 restrictions in her activities of daily living, mild difficulties in
5 maintaining social functioning, mild difficulties in maintaining
6 concentration, persistence and pace, and no extended episodes of
7 decompensation. (Tr. 15-16.)

8 Plaintiff provided few medical records predating her date of
9 last insured. Dottie Fuentes, BA, QMHP, examined Plaintiff on
10 December 15, 2005. (Tr. 171-75.) Plaintiff reported that the
11 Effexor was "somewhat helpful" and Elavil was "not helpful at all."
12 (Tr. 171.) Ms. Fuentes diagnosed Plaintiff with major depression,
13 recurrent, moderate and rule out PTSD. (Tr. 173.)

14 On December 19, 2005, Plaintiff was examined by Nilda Salazar,
15 M.D. (Tr. 169-70.) Dr. Salazar noted Plaintiff stated that she was
16 raised by different foster parents, her childhood was traumatic and
17 she was raped by stepbrother at age 12. (Tr. 169.) Plaintiff also
18 told Dr. Salazar that she took Effexor for two years, but stopped
19 when she moved, but her symptoms worsened, so she found a new doctor
20 and was put on Elavil. (Tr. 169.) Plaintiff reported that she had
21 been on Elavil "for years now" but the depression continued. (Tr.
22 169.) Dr. Salazar diagnosed Plaintiff with major depressive
23 disorder, recurrent without psychosis, and history of polysubstance
24 dependence in full remission, and assigned Plaintiff a GAF score of
25 60. (Tr. 170.)

26 The ALJ's reasons for finding Plaintiff did not have a severe
27 impairment are not supported by the record. First, the ALJ
28 concluded that Plaintiff's depression was "well-controlled by

1 medication" and that by December 30, 2005, Plaintiff's mental
2 impairment "was under good control with medication and therapy."
3 (Tr. 14; 16.) The records contradict this conclusion. Plaintiff
4 reported that Effexor was somewhat helpful for a time, but Elavil
5 was not helpful at all, and her depression continued. (Tr. 169.)
6 Moreover, in December, 2005, Dr. Salazar recognized that Plaintiff's
7 medication was not working, and changed her medication to Paxil.
8 (Tr. 170.) Under this record, a prescription for new medication
9 gives rise to a reasonable inference that Plaintiff's depression was
10 not "well controlled." Also, Dr. Salazar performed a mental status
11 exam and observed Plaintiff's affect as flat, her mood was depressed
12 and she appeared anxious. (Tr. 170.)

13 Additionally, the ALJ rejected Dr. Salazar's opinion without
14 identifying the "objective medical evidence" that contradicts that
15 opinion. "[C]onclusory reasons will not justify an ALJ's rejection
16 of a medical opinion." *Regennitter v. Comm'r Soc. Sec. Admin.*, 166
17 F.3d 1294, 1299 (9th Cir. 1999). Instead, the ALJ opined that Dr.
18 Salazar's opinion did not indicate Plaintiff was disabled, or had an
19 impairment that might cause significant limitation to perform work
20 activities. (Tr. 17-18.) An impairment is considered not severe
21 only if evidence establishes a "slight abnormality" that has no more
22 than a minimal effect on the ability to work. *Smolen*, 80 F.3d at
23 1290. "If such a finding is not clearly established by medical
24 evidence, however, adjudication must continue through the sequential
25 evaluation process." SSR 85-28.

26 In this case, the evidence indicates Plaintiff had trouble
27 getting along with others, cried throughout medical examinations,
28 felt hopeless, irritable and has a short fuse with her stepsons.

(Tr. 171-72.) Basic work activities include responding appropriately to supervision, co-workers and usual work situations. SSR 85-28. Plaintiff provided evidence that established she had more than a slight abnormality in her ability to get along with others and appropriately handle daily situations and, thus, perform work activities due to her mental impairment. As a result, the ALJ's rejection of Dr. Salazar's opinion was error, and the resultant conclusion that Plaintiff's mental impairment did not qualify as a severe impairment was error.

B. Remedy.

Plaintiff also raised the issue that the ALJ erred in determining credibility. Because the error at step two taints the entire sequential evaluation process, a new sequential evaluation must be undertaken including a new credibility determination. However, the court notes, a step two determination Plaintiff has a severe disability is merely a threshold determination, and Plaintiff may not necessarily succeed on her claim that she is disabled once the complete sequential evaluation is performed. See *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007); *Harman*, 211 F.3d at 1179. Conversely, a reasonable ALJ may find Plaintiff "disabled" upon consideration throughout the sequential evaluation process of all limitations caused by medically determinable impairments (severe and non-severe) in combination (as required by 20 C.F.R. §§ 404.1523, 416.923). *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). On remand, Plaintiff may further develop the record by submitting additional evidence predating Plaintiff's date of last insured, supporting Plaintiff's mental impairment claim. Additionally, if necessary, the ALJ should

1 consider testimony from an independent medical expert to assist in
2 determining the severity of Plaintiff's impairments. Accordingly,

3 **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (ECF No. 13) is
5 **GRANTED** and the matter is **REVERSED AND REMANDED** to the Commissioner
6 for additional proceedings;

7 2. Defendant's Motion for Summary Judgment (ECF No. 17) is
8 **DENIED;**

9 3. An application for attorney fees may be filed by separate
10 motion.

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant. Judgment
13 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

14 DATED October 22, 2012.

15
16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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